

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
KAISER ALUMINUM AND CHEMICAL  
CORPORATION, TACOMA,

Appellant,

v.

PUGET SOUND AIR POLLUTION  
CONTROL AGENCY, and STATE OF  
WASHINGTON, DEPARTMENT OF  
ECOLOGY,

Respondent.

PCHB No. 85-172

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

THIS MATTER, the appeal of the imposition of a civil penalty in the sum of \$400 for a violation of WAC 173-415-030(4) came on for formal hearing before the Pollution Control Hearings Board; Wick Dufford and Lawrence J. Faulk (presiding) on October 24, 1985, at Lacey, Washington.

Appellant, Kaiser Aluminum and Chemical Corporation was represented by Attorney at Law Joanne Henry. Respondent Puget Sound Air Pollution Control Agency (PSAPCA) appeared by its attorney

1 Keith D. McGoffin. The respondent Department of Ecology (DOE) did not  
2 appear at the hearing but participated through briefing of the legal  
3 issues. The proceedings were reported by Nancy A. Miller, Court  
4 Reporter with Robert Lewis & Associates.

5 Witnesses were sworn and testified. Exhibits were admitted and  
6 examined. Argument was heard. From the testimony, evidence and  
7 argument, the Board makes these

#### 8 FINDINGS OF FACT

##### 9 I

10 Appellant, Kaiser Aluminum and Chemical Corporation operates a  
11 primary aluminum reduction plant on the tideflats in Tacoma,  
12 Washington.

##### 13 II

14 Respondent PSAPCA is a municipal corporation with responsibilities  
15 for conducting a program of air pollution prevention and control in a  
16 multi-county area which includes Pierce County. The agency has  
17 submitted a certified copy of its Regulation I. Judicial notice is  
18 taken of that document.

##### 19 III

20 The DOE is a state agency which shares air pollution control  
21 responsibilities with regional authorities such as PSAPCA. The DOE  
22 intervened as a party respondent here because its regulation  
23 respecting primary aluminum reduction plants was challenged and  
24 because of its special role in the state-wide control of aluminum  
25 plant emissions.

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
PCHB No. 85-172

IV

In the spring of 1985, appellant began a two-year, eight million dollar project to reduce its air pollution emissions by one-third at its Tacoma tideflats plant. The new installation is to replace the duct work that collects chloride fumes and particulates from the plant's aluminum reduction pot lines and carries gases and particulates to the air scrubbing unit. The design should reduce emissions by five percent making the system ninety percent effective in removing waste fumes from the air.

V

On May 30, 1985, appellant wrote to DOE with a carbon copy to PSAPCA indicating that they would be replacing the 15 pot ventilation heaters for cells 1 through 15 in Line I, beginning June 3, 1985. The project was expected to take 8 to 10 days during which time none of the fumes from these 15 cells would be collected.

VI

On June 7, 1985 in the morning while a routine patrol, PSAPCA's inspector observed a white/blue emission from the roof top monitor of Pot Line #1 at Kaiser Aluminum and Chemical Corporation, 3400 Taylor Way, Tacoma, Washington. The inspector properly positioned himself and began his observations. His readings indicate the the opacity was from 30 to 45 percent over a fourteen and one half minute observation period. The inspector also took pictures of the plume, which verify the testimony of his observations.

VII

The inspector's affidavit indicates that the line of sight from the inspector to Pot Line #1 roof top monitor was unobstructed; that the wind and plume were approximately at right angles to him; that the sky was overcast but the sun, if visible, would have been oriented within a one hundred forty degree sector behind the inspector; that visibility was good; that the inspector used the hills and dark colored structures as contracting background; and that he read the plume at the point of greatest opacity after its emission from the roof top monitors.

VIII

On June 7, 1985, PSAPCA's inspector wrote a Notice of Violation and mailed it to appellant.

IX

On July 31, 1985, PSAPCA issued to appellant a civil penalty in the amount of \$400 for exceeding the opacity standard contained in WAC 173-415-030(4) on June 7, 1985. On August 27, 1985, this Board received Kaiser's appeal.

X

Respondent, Department of Ecology (DOE), has exercised its power under RCW 70.94.395 to assume regulatory control over emissions from primary aluminum plants on a statewide basis. However it has delegated certain responsibilities for enforcement to PSAPCA, including the issuance of notices and orders of penalty for violations of the type involved here. The applicable rules for primary aluminum

1 plants are set forth in DOE's chapter 173-415 WAC, including the  
2 opacity standard, WAC 173-415-030(4).

3 XI

4 There is no evidence that the event in question directly caused  
5 injury to human health, plants, animal life or property, or  
6 unreasonably interfered with the enjoyment of life and property.  
7 However, this site is located in a federally designated nonattainment  
8 area for total suspended particulate matter. This means the national  
9 ambient air quality standard for such material (promulgated by the  
10 United States Environmental Protection Agency) has not been attained  
11 and maintained in the area. The standard was established at a level  
12 selected for the protection of public health.

13 Appellant did not controvert the facts evidenced by the PSAPCA  
14 inspector's observations in any instance.

15 XI

16 Appellant argued that they have to the extent practicable  
17 maintained the air pollution control equipment associated with this  
18 pot line in a manner consistent with good air pollution control  
19 practices. They contend that respondents knew in advance that  
20 reconstruction work could temporarily increase emissions. They  
21 notified both the Department and PSAPCA of these facts pursuant to WAC  
22 173-415-070, and therefore believe they should be excused from the  
23 penalty. They testified that it was not practical to shut down the  
24 plant to make these improvements.

XII

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters. Chapters 43.21B and 70.94 RCW.

II

Chapter 173-415 WAC is the DOE's regulation for Primary Aluminum plants. WAC 173-415-030 is entitled "Emission Standards." Subsection (4) thereof reads as follows:

Visible emissions. Visible emissions from any emissions unit in a primary aluminum plant shall not exceed an average twenty percent opacity for more than six consecutive minutes in any sixty minute period. This provision shall not apply when the presence of uncombined water is the only reason for the opacity of the plume to exceed twenty percent.

III

In its Notice of Appeal, Kaiser raised the issue of the validity of WAC 173-415-030(4). The company alleged that the subsection "is invalid because it proscribes conduct which is not made illegal by the Washington Clean Air Act."

After its intervention, the DOE responded by filing a motion asserting that this Board lacks the authority to determine the validity of an agency rule.

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW & ORDER  
PCHB No. 85-172

1 By separate Order issued October 29, 1985, we denied DOE's motion,  
2 affirming our ability to evaluate regulations as applied in the  
3 context of a contested case. Weyerhaeuser Co. v. Department of  
4 Ecology, 86 Wn.2d 310, 545 P.2d 5 (1976). We called for briefs on the  
5 substantive issue.

6 IV

7 Appellant's argument is that no limitation adopted under the  
8 Washington Clean Air, chapter 70.94 RCW, is valid unless its violation  
9 also violates the definition of "air pollution." The definition of  
10 "air pollution" is set forth at RCW 70.94.030(2):

11 "Air pollution" is presence in the outdoor atmosphere  
12 of one or more air contaminants in sufficient  
13 quantities and of such characteristics and duration  
14 as is, or is likely to be injurious to human health,  
plant or animal life, or property, or which  
unreasonably interfere with enjoyment of life and  
property. (Emphasis added.)

15 Appellant asserts that the opacity regulation in question is fatally  
16 flawed because it does not require proof of harm or the creation of a  
17 harmful potential. See Kaiser Aluminum v. PCHB, 33 Wn.2d 352, 654  
18 P.2d 723 (1982).

19 V

20 We have rejected this argument in the past as to opacity standards  
21 (St. Regis Paper Company v. PSAPCA & DOE, PCHB No. 82-135), and we do  
22 so again in this case. We hold that WAC 173-415-030(4) as applied is  
23 "reasonably consistent with the statute it purports to implement," and  
24 therefore valid. Weyerhaeuser, supra at 314.

25  
26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
PCHB No. 85-172

VI

Appellant's assertion that regulations must describe harmful or potentially harmful contamination amounting to "air pollution" arises from RCW 70.94.040, a remnant of the original 1957 air pollution law which makes causing "air pollution" unlawful. The argument's premise is that unless emissions violate RCW 70.94.040, they cannot violate the Washington Clean Air Act.

This may have been the case in 1957. It is not the case today. Over the years the Act has been substantially amended to provide authority to establish more restrictive control requirements by general regulation (e.g., RCW 70.94.331, RCW 70.94.380) or by individual order (e.g., RCW 70.94.152, RCW 70.94.155).

VII

The Washington Act, as now written, follows the pattern of the Federal Clean Air Act, 42 U.S.C. 7401 et sec. The underlying concept is to describe the total pollution budget for the receiving medium (the ambient air) and then to establish specific "end-of-stack" restrictions within that budget directed toward individual sources. In this scheme "air quality standards" describe the aggregate concentrations in the surrounding ambient air which must be maintained in order to avoid the harm of "air pollution." RCW 70.94.030(13). "Emission standards" by contrast are those limitations achievable by existing technology which can be imposed on releases or contaminants from individual sources. RCW 70.94.030(12); RCW 70.94.152.

VIII

The opacity standard of WAC 173-415-030(4) is an "emission standard" as that term is used in the Washington Act. RCW 70.94.030(1), (12), RCW 70.94.331(2)(b), (c).

IX

Basic to the statutory scheme is the understanding that pollution of the air can result from the aggregation of releases from multiple sources. If standards for any one source can be no stricter than the definition of pollution itself, then a single industrial operation could preclude all others from locating nearby and effectively preclude industrial growth. This would fly in the face of legislative intent. See Weyerhaeuser Co. v. SWAPCA, 91 Wn.2d 77, 586 P.2d 1163 (1978); RCW 70.94.011.

X

In 1972, the United States Environmental Protection Agency approved the Washington State Implementation Plan for National Ambient Air Quality Standards, 37 F.R. 10900, with the understanding that stringent "emission standards" could be adopted and enforced in the state. See 42 USC 7410(a)(2)(B). Opacity standards, like the standards at issue, were and are a part of the approved federal-state plan.

Conformity with the Federal Act was made an explicit purpose of the Washington Act by an amendment adopted in 1973. Section 1, chapter 193, Laws of 1973, 1st ex.sess; RCW 70.94.011.

Appellant's position is, in effect, that RCW 70.94.040 contains the exclusive substantive standard enforceable under the Washington Clean Air Act.

This view is at odds with the internal evidence of the Act itself. By their very nature "emission standards" must ordinarily be more stringent than the condition described by the term "air pollution." Otherwise the legislative direction to establish both "air quality standards" and "emission standards" would be meaningless. The two would have to be the same. Also meaningless would be the power of "local" authorities to adopt emission limits more stringent than the state-wide minimums. See RCW 70.94.331(2)(b), RCW 70.94.380, RCW 70.94.395.

The appellant's view is also at odds with many years of administrative construction at the local, state and federal levels. The Legislature, while adopting numerous amendments, has never seen fit to disturb the administrative construction which supports the validity of emission standards expressed in terms of opacity. The absence of legislative repudiation is highly persuasive. Green River Community College v. Higher Education Personnel Board, 95 Wn.2d 108, 622 P.2d 826 (1980).

We conclude that alterations in the Washington Act over time have eroded the importance of RCW 70.94.040. It is no longer the substantive core of the Act. The law of air pollution control is now primarily contained in regulations and orders adopted according to

1 specific later-enacted statutory mandates.

2 XII

3 Since 1969, RCW 70.94.431 has empowered DOE and "local"  
4 authorities to assess civil penalties on a strict liability basis for  
5 the violation of air pollution control regulations.

6 In 1984, the Legislature amended this section to increase the  
7 ceilings on civil penalty assessments. Section 2, chapter 255, laws  
8 of 1984. As a part of this amendment, the Legislature expressly  
9 established a penalty limit "for the violation of any opacity  
10 standard." Indirectly, this must ratify the validity of the opacity  
11 standards to which a penalty might relate.

12 XIII

13 We do not believe the case of Kaiser Aluminum v. PCHB, 33 Wn.2d  
14 352, 654 P.2d 623 (1982) is controlling here. That case involved a  
15 regulation dealing with the deposit of particulate matter on the  
16 property of others, not with opacity limitations or any other  
17 technology-based emission standards. The regulation in Kaiser was not  
18 an "end-of-stack" limitation, but rather a restriction concerned with  
19 direct environmental harm. As such, its vice was the failure to  
20 describe the harm it was aimed at in "air pollution" terms. The  
21 regulation at issue in the instant case is of a complete different  
22 type and its validity is governed by different statutory provisions.

23 XIV

24 The evidence indicates and the Board concludes that WAC  
25 173-415-030(4) which prohibits opacity exceeding 20 percent for more

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
PCHB No. 85-172

1 than six minutes in an hour, was violated by appellant's operation on  
2 June 7, 1985. The upset provision WAC 173-415-070, as amended on  
3 May 16, 1983, is merely a notice provision and does not contain any  
4 basis for excusing an incident which is otherwise a violation.

5 XV

6 Although DOE and its delegate PSAPCA (see RCW 70.94.395) were  
7 aware that Kaiser was in the process of improving its pollution  
8 control system and that the project would probably produce violations,  
9 no official permission for such violations was sought or given. The  
10 statute contains a specific provision for variances issued after a  
11 more or less formal process open to the public. RCW 70.94.181. That  
12 process was not followed here.

13 On the record before us, weighing all the facts and circumstances,  
14 we conclude that the penalty assessed in this instance is appropriate.

15 XVI

16 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
17 adopted as such.

18 From these Conclusions of Law the Board enters this  
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25

ORDER

The Notice and Order of Civil Penalty (No. 6316) is affirmed.  
DOE this 23rd day of January, 1986.

POLLUTION CONTROL HEARINGS BOARD

 1/23/86  
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LAWRENCE J. FAULK, Chairman

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WICK DUFFORD, Lawyer Member